



June 22, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *WC Docket 05-25 – Special Access Rates for Price Cap Local Exchange Carriers*

Dear Ms. Dortch:

We understand that the Commission is considering gathering additional data on the market for special access services, including detailed information on specific business and cell-site locations served by special access. This data is highly sensitive proprietary information both for Sprint and for alternative providers of special access. Sprint submits this letter to outline steps the Commission can take to ensure that such information is protected and to facilitate its collection.

Reform of special access regulation is of great importance to the Nation's broadband future and Sprint supports the Commission's timely access to the data it believes would assist it as it moves to restore sensible regulation to this market. Because of the highly sensitive nature of this information, however, the Commission will need to establish greater protections than it might ordinarily provide if it is to receive information from as many parties as possible, as quickly as possible. The Commission should guarantee that persons outside the Commission will not have access to it, even under the terms of the existing protective order.¹

Sprint proposes that the Commission adopt a comprehensive protection regime for any data submitted. In particular, Sprint proposes that any request for detailed location information about competitive carriers' special access networks should provide that all such information would be disclosed to the Commission in confidence.² The Commission would release the raw data only to those retained by the Commission to assist it in its assessment and analysis. The Commission would, on the basis of the data provided, compile a report concerning competition in special access markets that would include tables presenting aggregated data, which it would place into the public record and on which it would allow comment.

¹ See *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Order, DA 05-1635 (June 8, 2005).

² Similar data provided by price cap carriers about the extent of their networks – which will be necessary for the Commission to develop an accurate understanding about the nature of competition in the market – should be treated in the same manner if those carriers consider the data confidential.

Such a process would be lawful, and the Commission has ample authority to proceed in such a manner. The Commission's rules provide flexibility to devise an appropriate confidentiality regime, and allow anyone to submit information to the Commission with a request for confidentiality.³ The Commission's general policy regarding confidentiality in rulemaking proceedings recognizes that, in many cases, a protective order such as the one that has already been entered in this docket strikes the right balance between openness and protection.⁴ But the Commission has also expressly provided that it possesses authority to use a different approach when appropriate.⁵ This is a case where additional protection is needed because Sprint and many competitive special access providers regard the data the Commission is likely to request as their "crown jewels."⁶ Importantly, Commission actions that adequately protect company-specific data will lead to more companies being willing to volunteer data.⁷

Providing such confidentiality would not be new for the Commission; it provides similar protection in many other reporting contexts. For example, both to ensure the accuracy of reported information and to protect carriers from competitive harm, the Commission provides for confidentiality of network outage reports, even though they are of obvious interest to the public as well as to competitors.⁸ In contrast, there is little reason for the public to want to know precise building-by-building information about competitive special access providers' networks. The Commission's practice with regard to its Form 477 reports is similar; the reports are confidential, and the Commission publishes data in aggregate form.⁹ Reports of international revenue likewise protect the confidentiality of carrier information.¹⁰

³ 47 C.F.R. § 0.459.

⁴ See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Report and Order*, 13 FCC Rcd 24816, 24843-45 (1998) ("*Confidentiality Order*").

⁵ See *id.* at 24833 (¶ 23).

⁶ Letter of CCIA, Ad Hoc Telecommunications Users, tw telecom, inc., Sprint, et al., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket 05-25 (June 3, 2009) at 3.

⁷ There is no question that the information of concern to the competitive special access providers is protected from release under the Freedom of Information Act ("FOIA") by Exemption 4. See *Confidentiality Order*, 13 FCC Rcd at 24820 (¶ 5) ("Exemption 4 allows an agency to withhold business competitive information from public disclosure"). Accordingly, the Commission would be justified in denying any FOIA request seeking access to raw data provided by competitive special access providers.

⁸ See MSNBC Interactive News, LLC; On Request for Inspection of Records, *Memorandum Opinion and Order*, 23 FCC Rcd 14518, 14523-27 (¶¶ 11, 14-17) (reaffirming that outage reports will not be disclosed despite FOIA request).

⁹ See Local Telephone Competition and Broadband Reporting, *Report and Order*, 19 FCC Rcd 22340, 22352-53 (¶¶ 24-25 & n56) (2004); *Center for Pub. Integrity v. FCC*, 505 F. Supp. 2d

Sprint proposal that the Commission treat raw data confidentially, while obtaining comment and basing any final decision on reports presenting aggregated data, is fully consistent with the Administrative Procedure Act (“APA”). The APA requires that “studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.”¹¹ Thus, the test is whether commenters have “meaningful notice and an opportunity for comment” – and, as explained below, that does not require access to raw rather than aggregated data in this proceeding.

As an initial matter, it is important to ensure that the raw data on which revised rules are based is reliable. But it is not necessary to make the raw data available to other carriers to do so. Indeed, because ILECs and other competitive carriers do not know the locations served by a particular competitive carrier, they are not well-positioned to determine the accuracy of data that is submitted. The Commission and its consultants must ensure the validity of the raw data.

As a basis for rulemaking, aggregated data is more useful than raw data. The purpose of collecting data about the deployment of competitors’ networks is to resolve disputes about the state of competition in the provision of special access services. That requires aggregation. For example, the Commission will need to determine what percentage of cell sites and office buildings are served by competitive special access providers to assess the level of competition that exists – which requires the aggregation of data concerning cell sites and office buildings. It will no doubt be important to produce more detailed analyses, such as differences in the level of competition at locations with different levels of demand. But the key point is that it is aggregated rather than raw data that is critical for meaningful comment on the level of competition.

Moreover, the rules the Commission develops based on its collection of data on the special access market are sure to be phrased in terms of aggregated data. For example, the Commission might determine that for a geographic area to be presumptively competitive a certain percentage of locations must be served by competitors. It is not necessary for commenters to examine raw data about individual buildings to comment meaningfully on what the appropriate thresholds for such regulations should be.

It could not be the rule that the APA prohibits reliance on studies unless the raw data underlying them is subject to review. Many studies, such as medical studies, necessarily rely on a promise of confidentiality in order to gather the raw data that will then be analyzed. Similarly,

106 (D.D.C. 1998) (upholding Commission’s refusal to disclose Form 477 data in the face of a FOIA request).

¹⁰ See, e.g., FCC Releases “Trends in the International Telecommunications Industry” Report, 2005 FCC LEXIS 5049, app. A n.4 (rel. Sept. 14, 2005) (explaining reporting of confidential international telecommunications revenues).

¹¹ *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008).

a study assessing the impact of watching violent television on children need not reveal the names of the children involved in order for the Commission to rely on it, or for commenters to be able to critique it. Likewise, a study assessing the level of competition in a special access market that surveys providers to determine the precise extent of their networks need not reveal that company-specific information in order for the Commission to rely on it or for commenters to be able to weigh in on the study. In each case, publication of the data in summary form should be sufficient. Indeed, in many cases, data underlying a published study might not be available. That mere fact cannot mean that a rule that finds support, in part, in the study's conclusions, must be overturned.

The recent GAO study of special access also shows that the unavailability of raw data does not preclude reliance on a study.¹² The GAO study provided plentiful data, although it did not always provide it in the most granular form. This did not prevent commenters from being able to discuss the study, and there can be no serious question that the Commission could reasonably refer to such a study in promulgating new rules.¹³

The conclusion that raw data need not be made available for comment is nothing new for the Commission. The Office of General Counsel filed a brief in 2005 stating as much. As the brief explained, while courts have required crucial factual information on which a rule is based to be made available to the public and "exposed to refutation," those cases "do not support the proposition that the record must contain the raw data underlying a study that itself has been placed in the record."¹⁴

The D.C. Circuit's recent decision in *American Radio Relay League*, where the court held that the Commission needed to make unredacted studies relating to interference tests available for comment, is not to the contrary. The issue in that case was not whether raw rather than aggregated data needed to be included in the record, but whether the Commission could rely on redacted studies where the court examined the redacted material and concluded both that the redacted material was not exempt from disclosure under the Freedom of Information Act and that it "could call into question the Commission's decision to promulgate the rule" at issue.¹⁵ The court emphasized that "[t]he narrowness of our holding under section 553 of the APA is

¹² Government Accountability Office, Report to the Chairman, FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services, GAO 07-80 (Nov. 2006).

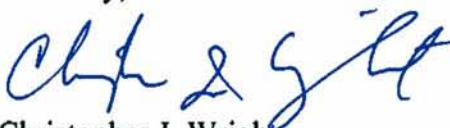
¹³ See, e.g., *American Public Communications Council v. FCC*, 215 F.3d 51, 58 (D.C. Cir. 2000) (rejecting the claim that the Commission could not rely on industry coalition's summary data along with an explanation of the methodology used to generate the summary data).

¹⁴ Brief for Respondents, *EchoStar Satellite, L.L.C. v. FCC*, No. 04-1304 (filed July 25, 2005) (internal quotation marks and citations omitted).

¹⁵ 524 F.3d at 227.

manifest.”¹⁶ This case would be comparable if the Commission were to produce a report analyzing the state of competition using aggregated data and then redact any portions of the reports not supporting the rule the Commission prefers. Of course, we are not proposing such an approach. Rather, the Commission should gather the data it believes it needs and then produce fully accurate reports on which the parties may comment and on which the Commission may base revised special access rules.

Sincerely,

A handwritten signature in blue ink, appearing to read "Chris J. Wright", with a stylized flourish at the end.

Christopher J. Wright
Paul Margie
Joseph C. Cavender

¹⁶ *Id.*